86 No. 1538

SUPREME COURT, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1987

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT MOSLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Question Presented

Whether the New York Court of Appeals erroneously interpreted the Fourth Amendment to mean that a police frisk of one individual on a public street resulting in the seizure of contraband and the arrest of another individual for constructively possessing that contraband gives the constructive possessor an automatic federal constitutional right to contest the frisk of the first individual.

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October Term, 1987

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT MOSLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner respectfully prays for a writ of certiorari to review the judgment of the New York Court of Appeals entered in the above-captioned case on October 16, 1986.

Opinions Below

The decision of the New York Court of Appeals, reversing the order of the New York Supreme Court, Appellate Division, First Department, granting the respondent's motion to suppress physical evidence, and dismissing the indictment against the respondent, *People* v. *Mosley*, 68 N.Y.2d 881 —— N.E.2d —— (1986), is appended hereto

as Appendix A. The decision of the New York Court of Appeals denying petitioner's motion for reargument and rehearing, *People* v. *Mosley*, —— N.Y.2d ——, —— N.E.2d ——(Dec. 18, 1986), is appended hereto as Appendix B. The order of affirmance without opinion of the Supreme Court of the State of New York, Appellate Division, First Department, reported at 120 A.D.2d 995, —— N.E.2d —— (1st Dept. 1986) is appended hereto as Appendix C. The opinion of the Supreme Court of the State of New York, Bronx County (Klein, J.), not reported, is appended hereto as Appendix D.

Jurisdiction

The Judgment of the Court of Appeals of the State of New York was entered on October 16, 1986. The Court of Appeals denied Petitioner's timely motion for reargument and rehearing on December 18, 1986. On February 4, 1987, The Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States, ordered the time for filing this petition for writ of certiorari be extended to and including March 18, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

Amendment IV of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

Amendment XIV of the United States Constitution, Section 1 provides, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Statement of the Case

A. Statement Of Facts

This statement of facts, essentially undisputed, is drawn from the decision of the New York Court of Appeals (Appendix A, pp. 6a-7a).

At 10:15 p.m. on December 22, 1983, plain-clothed police officers in The Bronx observed respondent Mosley and two companions, Mackie and another, walking about twenty-five yards behind an elderly woman around three sides of a block before the woman crossed the street to enter an apartment. Respondent and his companions began to cross the street after her, but had turned back and continued on their way when the police officers pulled their cars in front of and behind the three and stopped them on the sidewalk. When a frisk of the trio revealed a starter pistol on Mackie, but nothing on the other two, the police arrested all three for possession of Mackie's weapon. A subsequent search of respondent at the police station yielded a .22 caliber pistol in respondent's pocket, not found in the earlier frisk.

B. Procedural History

The respondent was indicted by the Grand Jury of Bronx County, New York, on a charge of Criminal Pos-

session of a Weapon in the Third Degree. Thereafter, the respondent moved to suppress the gun and ammunition that the police found in his pants pocket and an inculpatory statement he made to the police as obtained in violation of his right to be free from unreasonable searches and seizures. The New York Supreme Court, Bronx County (Klein, J.), finding that "[t]he defendant does not have standing to challenge the frisk which produced the starter's pistol from defendant Mackie," and concluding that the police acted reasonably, denied the motion after a hearing conducted pursuant to New York Criminal Procedure Law section 710.60(4). (p. 7a). The respondent subsequently pleaded guilty to a charge of Criminal Possession of a Weapon in the Third Degree [New York Penal Law section 265.02(4)] and was sentenced to a five-year period of probation and a $500.00 fine.

The New York Supreme Court, Appellate Division, First Department unanimously affirmed the judgment of the hearing court, without opinion. The New York Court of Appeals, in a summary memorandum decision, written without the benefit of full briefing and argument by the parties, reversed the order of the Appellate Division, granted the respondent's motion to suppress, and dismissed the indictment. *See* 22 N.Y. Admin. Code tit. 22 § 500.4 (1986). (summary consideration procedures).

C. Decision Of The New York Court Of Appeals

The Court of Appeals held that the conduct observed by the police officers was insufficient to justify the "stop and frisk" that revealed a starter's pistol on the respondent's companion, Mr. Mackie. The Court then held that

the respondent had "standing" to contest the frisk of Mr. Mackie as a legal consequence of the state's allegation that he constructively possessed Mr. Mackie's starter's pistol. Therefore, according to that court, without the starter's pistol, the police lacked probable cause to arrest the respondent. Since there was no probable cause to arrest the respondent, that court concluded, the fruits of the subsequent search and interrogation should have been suppressed.

REASONS FOR GRANTING THE WRIT

POINT

The New York Court of Appeals misinterpreted the Fourth Amendment and disregarded the express rulings of this Court by holding that respondent had automatic standing to challenge the propriety of the frisk of his companion.

Until the New York Court of Appeals rendered the decision below, no Fourth Amendment issue appeared as well-settled as the demise of the doctrine of "automatic standing." In *United States* v. *Salvucci*, 448 U.S. 83 (1980) and *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), this Court extinguished that doctrine, barring the Fourth Amendment door to all but those who could demonstrate a legitimate expectation of privacy in the area searched by the police, including those charged with possessory offenses. Nonetheless, the decision below, resting entirely on the federal constitution, resurrects the automatic standing doctrine on the basis of the same essential facts that this Court utilized to mark the end of automatic standing. Those facts arose in *Rawlings* v. *Kentucky*, 448 U.S. 98, where this Court held that a defendant did not have automatic

standing to challenge the search of a companion's purse merely because the defendant was charged with possessing the contraband inside that purse.

Despite this Court's clear precedent, the New York Court of Appeals, in its decision below, held that respondent had standing to challenge the frisk of his companion solely by virtue of being arrested for possessing a starter's pistol found on his companion's person. This decision, ignoring this Court's rulings in *Rawlings* and *Salvucci*, (announcing demise of automatic standing), erroneously expands the circumstances under which a defendant is entitled to challenge, on federal constitutional grounds, the propriety of police action. Therefore, the Court should grant the instant petition in order to correct this clear misinterpretation of the federal constitution and to prevent New York courts from imposing an unfair and unwarranted burden on law enforcement officials.

Significantly, there is no doubt that, in reaching the decision below, the New York Court of Appeals was misapplying the United States Constitution, since the only two cases that the court cited, *People* v. *DeBour*, 40 N.Y. 2d 210, 215, 352 N.E.2d 562, 566 (1976) and *People* v. *Cantor*, 36 N.Y.2d 106, 110-11, 329 N.E.2d 872, 875-76 (1975), expressly relied upon the Fourth Amendment. Both of these cases discussed the proper scope of police encounters with civilians, delineating various levels of intrusiveness governed not by the state constitution, but by the federal constitution. *Compare* U.S. Const. amend. IV, *with* N.Y. Const. Art. I, § 12. Moreover, in a recently decided opinion, the New York Court of Appeals made it clear that New York's standing rule is no more generous than that de-

manded by the federal constitution. *People* v. *Gabriel Rodriguez,* —— N.Y.2d ——, —— N.E.2d —— (No. 13, slip op. at 3, Feb. 17, 1987). The absence of a "plain statement" that the decision below rests on independent and adequate state grounds further buttresses the conclusion that the New York Court of Appeals based its decision on federal constitutional principles. *See Michigan* v. *Long,* 463 U.S. 1032, 1041-42 (1983).

Colliding with these principles, as enunciated by *Rawlings,* 448 U.S. at 103 n.2, *Salvucci,* 448 U.S. at 92-93, and every federal Circuit Court of Appeals that has considered the situation involved in this case, the decision below posits the continued viability of automatic standing.* According to the decision below, when the police encounter criminal activity on the street, a police officer's allegation that one individual constructively possesses contraband found on a companion vests the constructive possessor with "standing" to challenge the search of his companion. *But see People* v. *Gabriel Rodriguez,* —— N.Y.2d ——, —— N.E.2d ——, (No. 13, Feb. 17, 1987); *People* v. *Ponder,* 54 N.Y.2d 160, 166 (1981) (both decisions holding that a defendant

* The only arguable distinction between this case and the traditional automatic standing cases is that here the challenged evidence was not recovered as a direct result of the challenged search. Rather, the challenged search (the frisk of Mr. Mackie) revealed evidence which led to the defendant's arrest, post-arrest interrogation, and search incident to arrest which recovered the contraband for which defendant was indicted. That distinction is of small moment here because when a defendant challenges evidence as derivatively tainted by an improper search, he still must demonstrate an expectation of privacy in the area searched and must demonstrate that the taint infringes his own Fourth Amendment rights. *Wong Sun* v. *United States,* 371 U.S. 471, 491-92 (1963). Therefore, the same question is implicated whether the challenged evidence flows directly or derivatively from a possibly tainted search: need a defendant charged with a possessory offense demonstrate a legitimate expectation of privacy in the area searched?

cannot assert automatic standing where he is charged with possessing contraband found in another person's residence). Apparently, the New York Court of Appeals is of the opinion that the doctrine of automatic standing is still viable in the limited context of a street encounter. This ruling directly conflicts with those of the numerous federal courts, including this Court, acting in its supervisory role, which have held that this Court's decisions in *Salvucci* and *Rawlings* clearly apply to the facts of the instant case.* Each of these cases stands for the proposition that automatic standing is defunct, without regard to whether the challenged search is of a person or of a place, or whether it occurs in a residence or on the street. Under the federal constitution, an individual cannot claim that his own Fourth Amendment rights have been violated merely because those of a street companion have been violated. New York's clear misinterpretation of federal law thus stands in stark contrast to that of the federal courts, and this Court should review the decision below to resolve the conflict. *See Lakeside* v. *Oregon*, 435 U.S. 333, 336 (1978) (grant of certiorari warranted to resolve conflict between state court of last resort and federal court of appeal).

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* *See e.g., United States* v. *Payner*, 447 U.S. 727, 734-35 (1980); *United States* v. *Lace*, 502 F.Supp. 1021 (D. Vt. 1980), *aff'd* 669 F.2d 46 (2d Cir. 1982) (since *Salvucci* and *Rawlings* overruled automatic standing doctrine, allegation of possession does not automatically accord standing); *United States* v. *Herbst*, 641 F.2d 1161 (5th Cir. 1981); *cert. denied*, 454 U.S. 851 (1981) (two defendants do not have automatic standing to contest search of a companion where all three are charged with possession of the contraband found on the companion); *United States* v. *Mattes*, 687 F.2d 1039 (7th Cir. 1982) (bar patron does not have automatic standing to contest search of fellow patrons); *United States* v. *Brown*, 743 F.2d 1505 (11th Cir. 1984) (one defendant does not have standing to challenge search of companion where both are charged with possessing contraband found on companion).

If this Court does not correct the error of the decision below, the consequences will be far-reaching. New York's law enforcement officials will be forced to operate under a federally-derived handicap that exits nowhere else in the country. In New York, Fourth Amendment challenges will be open to criminals who would not be able to assert such challenges if they committed their crimes elswhere. New York's courts and law enforcement officials should not have to bear the weight of suppression hearings that this Court has held to be unwarranted. Moreover, there is no reason for the citizens of the State of New York to endure the social cost that would be inflicted by enlarging the class of individuals entitled to benefit from alleged police misconduct that affected another. As this Court has noted:

> Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

Rakas v. *Illinois*, 439 U.S. at 137-38 (footnote and citations omitted). *See also, United States* v. *Salvucci*, 448 U.S. at 95 ("the values of the Fourth Amendment are preserved by a rule which limits the availability of the exclusionary rule to defendants who have been subjected to a violation of their Fourth Amendment rights"). Because the decision below has transformed a police officer's decision to charge

a constructive possessory offense into an admission ticket to a suppression hearing, the search for the truth will be needlessly impeded. Individuals, charged with constructive possession of contraband recovered from a companion on a public street, but having no expectation of privacy in that companion's person, let alone an expectation that society chooses to deem legitimate, will now be able to seek suppression of the inculpatory evidence. Unlike a decision that marginally expands the scope of the Fourth Amendment by holding that certain facts demonstrate a legitimate expectation of privacy, the decision below selectively dispenses with the need to show a legitimate expectation of privacy at all, and returns New York to an unacceptable view of the Fourth Amendment, albeit only with respect to streets, airports, train stations, and any other non-residential location where one person carries contraband for another.

The error of the New York Court of Appeals is beyond doubt. This Court has held time and again that the Fourth Amendment exclusionary rule is only available to those who have a legitimate expectation of privacy in the area searched. *See Rawlings* v. *Kentucky*, 448 U.S. at 104; *United States* v. *Salvucci*, 448 U.S. at 95; *Rakas* v. *Illinois*, 439 U.S. at 137-38; *Katz* v. *United States*, 389 U.S. 347 (1967). Though unlikely, it is conceivable that the respondent had a legitimate expectation of privacy in the person of his associate, Mr. Mackie. But to suggest, as the New York Court of Appeals does, that the respondent need not be put to the test of demonstrating the legitimacy of his expectation is to misapprehend the Fourth Amendment. Therefore, this Court should grant the instant petition for *certiorari*.

Conclusion

For the foregoing reasons, we respectfully ask that a Writ of Certiorari Issue to Review the Judgment and Decision of the New York Court of Appeals of the State of New York.

Respectfully submitted,

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APPENDICES

Appendix A

Order of New York Court of Appeals Reversing Order of Appellate Division

STATE OF NEW YORK

COURT OF APPEALS

1 No. 420

THE PEOPLE &c.,

Respondent,

v.

ROBERT MOSLEY,

Appellant.

Decided October 16, 1986

. . .

APPEARANCES OF COUNSEL

Karen M. Kalikow & Philip L. Weinstein for appellant.

Mario Merola, District Attorney (Michael R. Gordon of counsel), for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be reversed, the motion to suppress granted, and the indictment dismissed.

At 10:15 p.m. on December 22, 1983, plain-clothed police officers in The Bronx observed defendant Mosely and two companions, Mackie and another, walking about 25 yards behind an elderly woman around three sides of a block before the woman crossed the street to enter an apartment.

Defendant and his companions began to cross the street after her, but had turned back and continued on their way when the police officers pulled their cars in front of and behind the three and stopped them on the sidewalk. When a frisk of the trio revealed a starter pistol on Mackie, but nothing on the other two, the police arrested all three for possession of Mackie's weapon. A subsequent search of defendant at the police station yielded a .22 caliber pistol in defendant's pocket, not found in the earlier frisk. Following denial of a motion to suppress the weapon, defendant pleaded guilty to criminal possession of a weapon in the third degree.

The conduct observed by the arresting officers was equivocal, at best, and could not constitute the type of specific articulable facts necessary to justify the stop and frisk (*see, People v DeBour*, 40 NY2d 210; *People v Cantor*, 36 NY2d 106; *People v Chapman*, 95 AD2d 782). Thus, no probable cause existed for the subsequent arrest of defendant and the station house search that led to discovery of the pistol, and the motion to suppress this weapon should have been granted. Inasmuch as the People rely on the discovery of the starter pistol on Mackie as the basis for the arrest of defendant—that defendant constructively possessed the weapon concealed on Mackie's person—defendant has standing to contest the frisk of Mackie.

• • •

Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock, Jr., concur in memorandum.

• • •

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed, etc.

Appendix B

Order of New York Court of Appeals Denying Motion to Reargue

Mo. No. 1324

THE PEOPLE &c.,

Respondent,

vs.

ROBERT MOSLEY,

Appellant.

Motion for reargument denied.

DECISION COURT OF APPEALS Dec. 18, 1986

Appendix C

Order of Appellate Division Affirming Judgment of Hearing Court

[Order Corrected June 19, 1986]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 29, 1986

Order of Affirmance on Appeal from Judgment 26994

The People of the State of New York,
Respondent,

against

Robert Mosley,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Archie Gorfinkel, J., at sentence; Martin Klein, J., at *Mapp* & *Huntley* hearing), rendered on October 17, 1984,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Appendix D

Judgment of Hearing Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: Part 78

Ind. No. 4553/83

THE PEOPLE OF THE STATE OF NEW YORK,

against

ROBERT MOSLEY,

Defendant

MARTIN B. KLEIN, J.:

The following constitutes the opinion, decision and order of the court.

An indictment has been filed against the defendant accusing him inter alia of the Class D felony of Criminal Possession of a Weapon in the Third Degree. The charge is that on December 22, 1983, defendant knowingly possessed a handgun.

Defendant, claiming to be aggrieved by an unlawful search and seizure, has made a motion pursuant to CPL §710.20(1) to suppress a handgun allegedly seized from his person by Officer Robert Mongelli on December 22, 1983.

In this case, the People assert that the seizure of the handgun from the defendant's person was pursuant to a

valid stop and frisk and incident to a lawful arrest. The People have the burden, in the first instance, of going forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the evidence should be suppressed.

In addition, defendant, claiming to be aggrieved by an unlawful or improper acquisition of evidence, has made a motion pursuant to CPL §§710.20(3) and (4) for an order suppressing a statement made by him on December 22, 1983 to Officer Mongelli on the ground that it was involuntarily made within the meaning of CPL §60.45.

A pre-trial Mapp and Huntley hearing pursuant to CPL §710.60(4) was conducted before me on April 11, 1984. The People called as a witness Police Officer Robert Mongelli, shield #31107 of the 44th Precint, NYCPD. The defendant called no witnesses.

I give full credence to the testimony of the People's witness.

I make the following findings of fact:

On December 22, 1983 at approximately 10:15 p.m., Officer Mongelli and his partner, Police Officer Tuccitto, were on patrol in the anti-crime unit. They were in plainclothes and driving an unmarked vehicle.

At about that time, Officer Mongelli observed three men, one of whom was the defendant, walking on the street, initially at 167th Street and Jerome Avenue in the Bronx. The three men appeared to be following an elderly woman, approximately sixty to seventy years old, and such conduct aroused the officers' suspicion. Officers Mongelli and Tuccitto and officers in another police vehicle kept the three suspects under observation as the suspects followed a cir-

cuitous route over a distance of about three blocks in apparent pursuit of the woman. On Nelson Avenue, the woman crossed the street and entered a building and the three suspects did not follow her.

At that time the officers stopped the three suspects and frisked them. Officer Mongelli found nothing on the defendant. Officer Bonnano found a starter's pistol on defendant Mackie. By this time a crowd had gathered. The officers brought the three suspects to the precinct and upon conducting a more detailed frisk, Officer Mongelli found a handgun in the defendant's right front pants pocket. This handgun is the subject of this motion.

At the precinct, Officer Mongelli read the defendant his Miranda rights. The defendant said that he understood them and then proceeded to make a statement regarding his acquisition of the gun.

I make the following conclusions of law:

There is no question that the police were acting within the bounds of permissible investigative conduct in keeping the three suspects under observation and in approaching them. Whether or not the initial frisk of the defendant was permissible is irrelevant since nothing was found and the frisk did not lead to the acquisition of evidence. The defendant does not have standing to challenge the frisk which produced the starter's pistol from defendant Mackie. See Peo. v. Henley, 53 NY2d 403 (1981). Upon discovery of the starter's pistol, there was probable cause to arrest the defendant and to conduct an extensive search of him upon booking him. Therefore, the defendant has not met his burden of proving that the handgun should be suppressed.

The defendant contends that the statement is inadmissible as the product of an unconstitutional arrest. Since

the People have established beyond a reasonable doubt the constitutionality of the arrest, therefore the statement was voluntary and is admissible.

Accordingly, defendant's motion to suppress the handgun, seized from his person is denied. His motion to suppress the statment is also denied.

The foregoing constitutes the opinion, decision and order of the court.

Dated: August 31 1984

/s/ M.B.K.
J.S.C.